No. 47158-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

SPOKANE COUNTY; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellants,

v.

SIERRA CLUB and CENTER FOR ENVIRONMENTAL LAW & POLICY,

Respondents.

BRIEF OF APPELLANT SPOKANE COUNTY

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I. INTRODUCTION

Spokane County appeals the Findings of Fact, Conclusion of Law and Order entered July 19, 2013, by the Pollution Control Hearings Board ("Board") in *Sierra Club v. Dep't of Ecology*, Pollution Control Hearings Bd. Case No. 11-84.

In the underlying administrative proceeding, Sierra Club and the Center for Environmental Law and Policy ("Sierra Club") appealed a Clean Water Act NPDES discharge permit that Ecology issued to Spokane County (the "Permit"). The Permit allows the County to discharge effluent from the operation of the County's state of the art Regional Water Reclamation Facility ("Facility"). The Sierra Club's appeal presented the Board with one issue: "Does the NPDES Permit No. WA-0093317 unlawfully authorize PCB discharges that will cause or contribute to a violation of water quality standards, including C.F.R. section 122.4 and WAC 173-201A Part III." After hearing three days of evidence, the Board properly upheld the Permit against that challenge. *Sierra Club v. Dep't of Ecology*, PCHB No. 11-184 Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Order (July 19, 2013) ("Board's Decision").

While the Board properly rejected the Sierra Club's appeal, the Board's Order went on to address several additional issues. Ultimately, the Board directed Ecology to modify Condition S12 of the Permit. *Id.*, pp.

27-28. Ecology had specifically prepared Condition S12 in the exercise of its discretion and technical expertise, because it believed it to be the best way to address the complex practical and scientific issues surrounding PCBs in the Spokane River during this Permit term. The Board's Order directing Ecology to modify Condition S12 derives from a single conclusion of law -- that Ecology "should have" conducted a reasonable potential analysis for PCBs. COL 10. In issuing this conclusion of law, the Board erroneously applied the law or acted arbitrarily and capriciously.

The Board's conclusion that Ecology "should have" conducted a reasonable potential analysis for PCBs in the Spokane River unlawfully trammels on Ecology's discretion. Ecology undoubtedly had discretion in deciding whether or not to conduct a reasonable potential analysis. Ecology reasonably exercised its discretion by determining *not* to conduct such an analysis. The Board made no findings to support a conclusion of law to the contrary, and could not have done so on the record evidence. The record evidence is clear and undisputed that Ecology's decision was well within the scope of its discretion under controlling EPA guidance on the issue. In fact, the EPA itself has made the same decision under nearly identical facts. Notwithstanding these facts, the Board's conclusion of law simply ignores the issue and improperly usurps Ecology's discretionary

authority. Under controlling law, however, the Board should have given deference to Ecology on a discretionary matter within the scope of Ecology's technical and scientific expertise. For that reason, the Board's conclusion of law that Ecology should have conducted a reasonable potential analysis must be reversed.

The Board used its improper conclusion that Ecology "should have" conducted a reasonable potential analysis as the foundation for its next conclusion of law: that there "is" a reasonable potential for the Facility discharge to cause or contribute to a violation of water quality standards for PCBs in the River. Board's Decision, COL 10. Ultimately, those conclusions served as the basis for the Board's directive to modify the Permit Condition S12.

Because the Board's initial conclusion must be reversed, there is no legal basis for its directive to modify Condition S12. Ecology properly decided not to conduct a reasonable potential analysis for PCBs at this time. Respecting that discretion, the Board should not have done so. Absent a legally valid determination that the discharge *has* a reasonable potential to cause or contribute to a violation of water quality standards, there is no requirement that the Permit include effluent limits. Because the Permit was not required to *have* effluent limits, there is no support for

the Board's conclusion that Condition S12 is inadequate as an effluent limit.

In sum, the Board improperly substituted its judgment for Ecology's on a discretionary issue within the scope of Ecology's expertise, without any legal basis that would entitle it to do so. Having improperly usurped Ecology's authority on a discretionary issue, the Board then proceeded to reach an issue Ecology properly declined to address, and then to find fault for Ecology's supposed "failure" to impose Permit conditions that are not required by law.

Because Ecology properly exercised its discretion in deciding not to conduct a reasonable potential analysis, it had no basis to determine whether there *was* a reasonable potential to exceed water quality limits. Given that it did not determine that there *was* a reasonable potential, Ecology was not required to include effluent limits in the Permit during this permit cycle. Because effluent limits were not required, the Permit cannot be found to be invalid for lack of an effluent limit. Absent invalidity, the Board has no authority to direct modification of the Permit. Consequently, the Board's order directing Ecology to modify Permit Condition S12 must be reversed.

II. ASSIGNMENTS OF ERROR

A. The Board erroneously applied the law, or acted arbitrarily and capriciously, in concluding that Ecology "should have" determined whether discharge from the Facility has a reasonable potential to cause or contribute to a violation of water quality standards for PCBs in the Spokane River.

Issue 1: Did Ecology have discretion in deciding whether to conduct a reasonable potential analysis when it lacked any facility specific monitoring data?

Issue 2: Can the PCHB lawfully usurp Ecology's discretionary decision making authority regarding matters involving Ecology's expertise in administering water quality laws and technical judgments about complex scientific issues, absent a valid finding that Ecology abused its discretion or acted arbitrarily or capriciously?

B. The Board erroneously applied the law, or acted arbitrarily and capriciously, by disregarding Ecology's discretionary decision *not* to conduct a reasonable potential analysis, and proceeding to issue a conclusion of law that effluent discharge from the Facility *has* a reasonable potential to cause or contribute to a violation of water quality standards for PCBs in the Spokane River.

Issue 3: Can the Board proceed to issue a conclusion of law that is inconsistent with Ecology's exercise of discretion, on a matter involving Ecology's expertise in administering water quality laws and Ecology's technical judgments about complex scientific issues, when Ecology has properly exercised its discretion and determined not to evaluate the matter?

C. Because there is no requirement that the Facility's Permit include effluent limits for PCBs, the Board erroneously applied the law, or acted arbitrarily and capriciously, by concluding that Permit Condition S12 is invalid as an effluent limit.

D. Because Permit Condition S12 cannot be found invalid as an effluent limit, there is no basis for the Board's Order directing Ecology to modify Condition S12.

Issue 4: Can the Board require Ecology to modify an NPDES Permit under WAC 371-08-540(2) when the Permit is not invalid under applicable statutes and guidelines of the state and federal governments?

III. STATEMENT OF THE CASE

On November 29, 2011, the Washington State Department of Ecology issued NPDES Permit WA-009331-7 to Spokane County. The Permit authorized the new, state of the art Spokane County Regional

Water Reclamation Facility ("Facility") to discharge reclaimed water to the Spokane River. Board's Decision, FOF 14, 15.

The Facility employs a Membrane BioReactor treatment technology – a cutting edge "advanced tertiary" water treatment technology – that provides the "most advanced treatment of effluent available and deploys the best currently available treatment technology to reduce the discharge of PCBs to the Spokane River at potentially undetectable levels." *Id.,* FOF 16.

Previously, the County's municipal wastewater had been treated by the City of Spokane's Riverside Park Water Reclamation Facility. *Id.,* FOF 10. The County's new facility removes approximately 99% of the PCBs from the influent prior to discharge. Testimony of Bruce Rawls, (Mar. 27, 2013), Report of Proceedings ("RP") at 463:18-22.

Spokane County had applied to Ecology for a Clean Water Act NPDES Permit for the Facility on September 30, 2010. Board's Decision, FOF 18. Richard Koch, a water quality specialist with Ecology's Eastern Regional Office, was assigned to review the application and prepare the NPDES Permit. *Id.* In preparing the NPDES Permit, one issue of concern was the discharge of PCBs into the River, and whether the Permit should contain an effluent limit for PCBs. *Id.*, FOF 19. Regulations adopted by EPA require that a NPDES Permit include effluent limitations if the

discharge causes, has the reasonable potential to cause, or contributes to a violation of a water quality standard. 40 C.F.R. 122.44(d)(1)(iii). This determination by the Permit issuing regulatory authority, in this case, Ecology, is known as the "reasonable potential analysis."

EPA has published guidance for state environmental regulatory authorities to follow in determining whether, and if so, how, to perform this reasonable potential analysis. This guidance is EPA's "Technical Support Document for Water Quality-Based Toxics Control." Ex. A-20, Administrative Record ("AR") p. 2587. As pertinent here, EPA's Technical Support Document includes guidance for circumstances in which the regulatory authority is processing a permit application without facility specific effluent monitoring data, as was the case for the County's Facility. EPA's guidance clearly makes the decision of whether to conduct a reasonable potential analysis in the absence of facility specific effluent monitoring data discretionary with the regulatory authority:

> If the regulatory authority so chooses, or if the circumstances dictate, the authority may decide to develop and impose a permit limit for whole effluent toxicity or for individual toxicants without facility-specific effluent monitoring data, or prior to the generation of effluent data.[1]

The Technical Support Document provides that the regulatory authority may decide conduct a reasonable potential analysis and develop effluent

[1] Ex. A-20 p. 50, AR p. 2656 (emphasis supplied).

limits in the absence of monitoring data by reference to a variety of other factors. However, EPA recommends caution in that regard, and emphasizes the discretionary nature of this decision:

> Regardless, the regulatory authority, if it chooses to impose an effluent limit after conducting an effluent assessment without facility-specific data, will need to provide adequate justification for the limit in its permit development rationale or in its permit fact sheet. A clear and logical rationale for the need for the limit covering all of the regulatory points will be necessary to defend the limit should it be challenged. In justification of a limit, **EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary.** In such a case, the regulatory authority may well benefit from the collection of effluent monitoring data prior to establishing the limit.
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> *If* the regulatory authority, after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to, an excursion above a numeric or narrative criterion for whole effluent toxicity or for individual toxicants, the authority should require whole effluent toxicity or chemical specific testing to gather further evidence. In such a case, the regulatory authority can require the monitoring prior to permit issuance, if sufficient time exists, *or it may require testing as a condition of the issued/reissued permit.*[2]

In accordance with this guidance, Ecology made a discretionary decision not to conduct a reasonable potential analysis, but to require instead that the Facility monitor its effluent and collect data so that Ecology can conduct a reasonable potential analysis for the next permit cycle. FOF 25; *accord* Spokane County Permit, Ex. ECY -1, AR 3645-46.

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[2] *Id,* p. 51, AR 2657 (italics supplied, boldface original).

Ecology's decision was explained at hearing by Mr. Richard Koch, who wrote the Permit. Mr. Koch did not know what the level of PCBs would be in the Facility's effluent, because there was no data available to make that determination. RP (March 25, 2013) at 70:7-12; 72:2-11. Not only was the facility new, but there were no other treatment facilities using such advanced technology. *Id.*, 96:12-97:4[3] Consequently, Koch followed the procedures published in the Technical Support Document for water quality based toxics control published by the EPA, and Ecology's Permit Writer's Manual. *Id.* at 70:16-3; 80:3-16; Ex. A17, p. VI-30.

Koch admitted that the EPA's Technical Support Document allows a permitting authority to consider other factors, including fish advisories, in determining whether there is a reasonable potential to cause or contribute to a violation of water quality standards. Koch Testimony (March 23, 2013), RP at 81:2-18. In this case, however, Koch felt that there was just too much "speculation and guess work" to make a reasonable potential determination without actual monitoring data from the facility. *Id.,* 96:12-97:4.[4] Consequently, the Permit was written to require monitoring, and provides that the effluent monitoring results for

[3] *Accord* Abusaba Testimony (March 27, 2013), RP 553:23-555:8.
[4] *See also,* Abusaba Testimony (March 27, 2013), RP 555:9-556:4 ("when you get down to those low concentrations, water quality criteria concentrations, you're at the level where you're at presence/absence detection, but you can't make quantitative comparisons.").

PCBs will be compiled and analyzed by Ecology for the purpose of establishing a performance based PCB effluent limitation for the following permit cycle. *Id*, 99:6-16; Ex. ECY-1, p. 9. Spokane County understands and expects Ecology to use the monitoring data required by the Permit to develop numeric effluent limits for the next Permit. Rawls Testimony (March 27, 2013), RP 435:12-21; (March 27, 2013), RP 489:20-490:14.

Notably, Ecology chose to follow the *exact* same approach the EPA itself took in issuing a Permit for Idaho discharges to the Spokane River upstream from Spokane. Koch Testimony (March 25, 2013), RP at 118:9-120:9; 124:23-125:5 (Ecology did what EPA Guidance document suggested, which is what EPA did in similar situation). In responding to comments regarding the lack of a reasonable potential analysis and effluent limits in permits for Idaho dischargers, EPA explained its decision as follows: "**The lack of data also prevents the EPA from determining whether the Idaho publicly owned treatment works (POTWs) have the reasonable potential to cause or contribute to excursions above any of the affected jurisdictions' water quality standards for PCBs.**" Ex. ECY 6, AR 3751-55, 3753 (EPA Responses to Comments) (emphasis supplied).

Monitoring data collected at the Facility since it began operations has reported PCB concentration in amounts so low that the Sierra Club's

expert called them "remarkable," and at levels that technical committees regarding PCB removal would have considered "not possible." DeFur Testimony, (March 26, 2013) RP 277:4-7. In fact, the PCB concentrations in the County's effluent are so low that an eminent expert "can't tell the difference between effluent and ultra-purified laboratory water."[5]

This scientific complexity – the incredibly minute concentrations of PCBs at issue in the Facility's effluent -- also influenced Ecology's discretionary decision, because the EPA's approved enforcement methodology for concentration detection will only measure PCBs at levels that are several orders of magnitude greater than the levels at which the

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5 Testimony of Khalil Abusaba, RP (March 27, 2013) at 576:17-577:7:

Q So Dr. Abusaba, what's the important summary point, if you actually consider all of the available data, all of the data available so far instead of just one datum point and take into account appropriate statistical analysis?

A From a standpoint of total PCBs, which is what the regulation is based on, we can't tell the difference between effluent and ultra-purified laboratory water either in the laboratory or in the travel blanks and certainly not in the rinsate blanks, which is the equipment blanks are really the ones that count.

Q And what's the conclusion then for the question of whether the county facility is contributing PCBs to the water?

A It just gets back to, Mr. Koch was right, the discharge of effluent from the membrane bioreactor system will not cause a measurable change in PCB concentrations of the river. We can't even see the difference in the effluent. In the effluent we can't even see the difference between effluent and ultra-purified laboratory water when you consider total PCBs.

measurement methodology must be accurate in order to protect water quality. As a consequence, as the EPA noted, "the numeric effluent limits for total PCBs enforced using currently approved methods would be meaningless." Koch Testimony (March 25, 2103), RP 141:13-144:18; Ex. ECY 6.[6] As Mr. Koch explained this point and its influence on Ecology's decision:

> Q [Referencing the Technical Support Document] That paragraph as I read it warns regulatory authorities or permit writers like yourself that if you choose to develop an effluent limit without data, you need to provide a rationale and an explanation for it; correct?
> A Correct.
> Q And based on the data you didn't have when you were directing the county's permit or developing that permit, were you able to develop a clear and logical rationale for placing numeric PCB limits into the county's permit?
> A Well, the first reason, we did not have data, it was a new facility, we would not have data for pretty much the life of the permit. Monitoring requirements for PCBs have a reporting limit to 10 picograms. The PCB source assessment is 100. To verify compliance, I would need to use a method -- I guess I'll back up and say the approved method in the Permit Writer's Manual, back of the fact sheet, back of the permit, is Method 608 has a detection limit of 0.25 micrograms, 250 nanograms, for the seven Aroclors to make up total PCBs. That's still at this time the only approved method for enforcement purposes.
>
> Ecology has used EPA Method 1668 for monitoring purposes, and monitoring purposes only, to get a handle on what the nature of the issue is out there. The data I have seen since issuing the permit, the blank samples are significant. Even doing it today, it would be a challenge to have -- to make use of the data appropriately for reasonable potential analysis.

[6] *See also* Abusaba Testimony (March 27, 2013), RP 551:6-552:23.

Koch Testimony (March 25, 2013), RP 122:14 -124:1.[7]

The Sierra Club appealed Ecology's issuance of Permit WA-009331-7 to the Washington State Pollution Control Hearings Board. Notice of Appeal, December 28, 2011, AR 000033-36. The appeal presented a single issue: "Does the NPDES Permit No. WA-0093317 unlawfully authorize PCB discharges that will cause or contribute to a violation of water quality standards, including 40 C.F.R. section 122.4 and WAC 173-201A Part III?" AR 002220.

The Sierra Club's primary argument to the Board was that 40 C.F.R § 122.4(i) prohibited Ecology from issuing an NPDES Permit absent completion of a PCB total maximum daily load analysis for the Spokane River. Board Decision, COL 4. The Board properly rejected that argument, and the Sierra Club has not appealed that decision. Nonetheless, and without addressing the issue of Ecology's discretion or otherwise justifying its interference with that discretion, the Board proceeded to issue a conclusion of law that Ecology "should have" conducted a reasonable potential analysis for PCBs. Having issued that conclusion, the Board then issued a conclusion of law that the Facility

[7] *Accord* Rawls Testimony (March 27, 2013), RP 494:12-25 ("We are using 1668 [to monitor effluent]. And the reason is we would most likely be getting near non-detects if we used the other one [Method 608] and then you wouldn't have any data that would be useful."

does have a reasonable potential to cause or contribute to a violation of water quality limits for PCBs in the River, and that, consequently, Ecology was required to impose effluent limits in the Permit. Finally, the Board issued a conclusion of law that Permit Condition S12 was not sufficient as an effluent limit, and remanded the Permit to Ecology with directions to modify Condition S12. Board Decision, COL 10-16 and Order ¶1(a)-(c).

Because the Board's initial conclusion of law is unsupported by any finding that Ecology abused its discretion, and because the Board failed to accord Ecology the deference to which it is entitled on a discretionary matter involving Ecology's expertise in administering water quality laws and technical judgments involving complex scientific issues, the Board's Order must be reversed.

IV. ARGUMENT

A. Standard of Review

The Board's orders are reviewed under the Washington Administrative Procedure Act (WAPA). *Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology,* 146 Wash.2d 778, 789-90, 51 P.3d 744 (2002); *see also* RCW 34.05.514(3). The Court may grant relief if it finds that the PCHB has erroneously interpreted or applied the law, or if

the order is arbitrary or capricious.[8] RCW 34.05.570(3)(d), (i). In reviewing the Board's decision, this court applies the APA standards directly to the agency record. *Jensen v. Department of Ecology,* 102 Wash.2d 109, 113, 685 P.2d 1068 (1984). The Board's legal conclusions are reviewed *de novo;* for issues of law or mixed issues of fact and law, the "error of law" standard applies. *Bowers v. PCHB*, 103 Wash.App. 587, 596, 13 P.3d 1076, 1083 (2000); *Rasmussen*, 98 Wash.2d 846, 849-50, 658 P.2d 1240, 1242 (1983).

Because the Legislature designated Ecology to regulate the State's water resources, RCW 43.21A.020, the Court affords Ecology's interpretation of relevant statutes and regulations dealing with water resources great weight, rather than the Board's. *Port of Seattle v. PCHB,* 151 Wash.2d 568, 593-94, 90 P.3d 659, 672 (2004); *Public Utility Dist. No. 1 of Clark County,* 137 Wash.App. at 157, 151 P.3d 1067. As the Board noted, it should have shown deference to Ecology's expertise in administering water quality laws. Ecology's technical judgments, especially those involving complex scientific issues, are also entitled to

[8] Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Hillis v. State, Dept. of Ecology*, 131 Wash.2d 373, 383, 932 P.2d 139, 144 (1997).

deference. Board's Decision, COL 1, *citing Port of Seattle,* 151 Wn.2d at 593-94. Under WAC 371-08-540(2), if the Board determines that an NPDES Permit is invalid, it can order Ecology to reissue the Permit "consistent with applicable statutes and guidelines of the state and federal governments."

" '[I]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.' " *Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish and Wildlife*, 182 Wash.App. 857, 867, 332 P.3d 1046, 1052 (2014), (*quoting Rios v. Dep't of Labor & Indus.,* 145 Wash.2d 483, 502 n. 12, 39 P.3d 961 (2002) (quoting RCW 34.05.574(1)). Ecology's exercise of discretion may only be reversed if it is manifestly unreasonable, *i.e.*, discretion exercised on untenable grounds or for untenable reasons. *Hadley v. Department of Labor & Indus.,* 116 Wash.2d 897, 906, 810 P.2d 500, 814 P.2d 666 (1991); *Islam v. State, Dept. of Early Learning*, 157 Wash.App. 600, 618, 238 P.3d 74, 83 (2010) ("a discretionary agency decision will not be set aside absent a clear showing of abuse), (*citing. Schuh v. Dep't of Ecology,* 100 Wash.2d 180, 186, 667 P.2d 64 (1983)); *Wilson v. Board of Governors,* 90 Wash.2d 649, 656, 585 P.2d 136 (1978), *cert. denied,* 440

U.S. 960, 99 S.Ct. 1503, 59 L.Ed.2d 774 (1979). In proceedings before the Board, the Sierra Club had the burden to prove that Ecology had abused its discretion.[9]

B. The Board erred in concluding that Ecology "should have" conducted an analysis to determine whether the discharge from the Spokane County Regional Water Reclamation Facility has a reasonable potential to cause or contribute to a violation of water quality standards for PCBs in the Spokane River.

EPA's Technical Guidance Document clearly endows Ecology with broad discretion in deciding whether to conduct a reasonable potential analysis prior to issuing an NPDES Permit when Ecology lacks monitoring data to support the analysis. (Ex. A-20, AR 2656-57) The EPA

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[9] *See, e.g., Port Townsend Paper Corp. v. Dep't of Ecology,* PCHB No. 98–77, 1999 WL 1611276, at *3 (Aug. 17, 1999) (burden of proof on company challenging opacity limit in permit conditions); *Marine Envtl. Consortium v. Dep't of Ecology,* PCHB Nos. 96–257 *et al.,* 1998 WL 934931, at *21 (Nov. 30, 1998) (burden of proof on environmental group challenging effluent limit in NPDES permit based on "all known, available and reasonable methods of treatment" (AKART)); *Save Lake Sammamish v. Dep't of Ecology,* PCHB No. 95–141, 1996 WL 379222, at *3 (June 27, 1996) (burden of proof on environmental group challenging AKART determination); *Univ. Mech. Contractors v. Puget Sound Air Pollution Control Agency,* PCHB No. 87–56, 1987 WL 55714, at *14 (appellants have burden of proof in challenge to emission limit based on best available control technology).

guidance allows Ecology to issue the permit and require monitoring in order to obtain the data, which is precisely what Ecology did in this case.

Although Ecology *could* have conducted a reasonable potential analysis by reference to other factors, it was not required to do so. Ecology's exercise of discretion in this regard involves its expertise in administering water quality laws, and requires a technical judgment involving complex scientific issues. Ecology's discretionary decision not to conduct a reasonable potential analysis is entitled to deference, and could only be reversed upon a showing that it is a manifestly unreasonable abuse of discretion. The Board reached no such conclusion, and made no findings that could support such a conclusion. Indeed, the record evidence before the Board was clear that EPA itself had made the same discretionary decision on nearly identical facts. Consequently, the Board's conclusion that Ecology "should have" conducted a reasonable potential analysis improperly applies the law, or is arbitrary and capricious, and must be reversed.

1. Ecology had discretion in deciding whether to conduct a reasonable potential analysis for PCBs in the Spokane River because it lacked any monitoring data to determine likely PCB concentrations in effluent from the Facility.

The EPA Technical Support Document for Water Quality-Based Toxics Control sets instructs Ecology about what to do if a permit application is received for a facility absent facility specific monitoring data:

> If the regulatory authority so chooses, or if the circumstances dictate, the authority may decide to develop and impose a permit limit for whole effluent toxicity or for individual toxicants without facility-specific effluent monitoring data, or prior to the generation of effluent data.[10]

Thus, the guidance allows Ecology to make a determination by reference to other information. However, EPA's guidance also *cautions* Ecology in that regard, and allows instead the course Ecology chose in this case:

> Regardless, the regulatory authority, if it chooses to impose an effluent limit after conducting an effluent assessment without facility-specific data, will need to provide adequate justification for the limit in its permit development rationale or in its permit fact sheet. A clear and logical rationale for the need for the limit covering all of the regulatory points will be necessary to defend the limit should it be challenged. In justification of a limit, **EPA recommends that the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary.** In such a case, the

[10] Ex. A-20 p. 50, AR p. 2656 (emphasis supplied).

> regulatory authority may well benefit from the collection of effluent monitoring data prior to establishing the limit.
>
> *If* the regulatory authority, after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to, an excursion above a numeric or narrative criterion for whole effluent toxicity or for individual toxicants, the authority should require whole effluent toxicity or chemical specific testing to gather further evidence. In such a case, the regulatory authority can require the monitoring prior to permit issuance, if sufficient time exists, *or it may require testing as a condition of the issued/reissued permit.*[11]

Thus, EPA's guidance expressly allows the regulatory authority a "choice," and provides that the authority "may" require testing as a permit condition in lieu of conducting a reasonable potential analysis without facility specific data. This language clearly denotes discretion. *See, e.g., Pierce v. Yakima County,* 161 Wash.App. 791, 800–01, 251 P.3d 270 (2011) (word "may" denotes discretion).

2. *The Board cannot usurp Ecology's discretion regarding matters involving Ecology's expertise in administering water quality laws or technical judgments about complex scientific issues absent a valid determination that Ecology abused its discretion.*

Ecology's decision whether to conduct a reasonable potential analysis was a discretionary decision implementing state and federal water

[11] *Id,* p. 51, AR 2657 (italics supplied, boldface original).

quality laws. Moreover, the decision required technical judgments involving complex scientific issues. Consequently, the Board should have shown deference to Ecology's expertise, and could only override Ecology's decision upon finding a manifest abuse of discretion. *Port of Seattle,* 151 Wn.2d at 593-94; *Islam v. State, Dept. of Early Learning*, 157 Wash.App. 600, 618, 238 P.3d 74, 83 (2010) ("a discretionary agency decision will not be set aside absent a clear showing of abuse), (*citing. Schuh v. Dep't of Ecology,* 100 Wash.2d 180, 186, 667 P.2d 64 (1983).

Ignoring the rules governing its review of Ecology's discretionary decision, the Board simply substituted its own judgment that Ecology "should have" conducted a reasonable potential analysis for Ecology's decision to require monitoring in order to conduct the analysis with facility specific effluent data. Board's Decision, COL 10. The Board's Decision completely ignores the fact of Ecology's discretion to determine the best course under the circumstances.

Because the Board ignored the fact of Ecology's discretion, the Board made no findings to support any conclusion of law that Ecology had abused its discretion, or that Ecology somehow acted in an arbitrary or capricious manner. Nor could the Board have made any such findings, given Ecology's reasoned explanation for not conducting the analysis, and the undisputed record evidence that EPA had made the same decision on

nearly identical facts.[12] *C.f., Hillis v. State, Dept. of Ecology*, 131 Wash.2d 373, 383, 932 P.2d 139, 144 (1997) (where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous). Consequently, the Board's Decision to substitute its judgment for Ecology's must be reversed. *Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish and Wildlife*, 182 Wash.App. 857, 867, 332 P.3d 1046, 1052 (2014) (" '[I]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency' "), (*quoting Rios v. Dep't of Labor & Indus.,* 145 Wash.2d 483, 502 n. 12, 39 P.3d 961 (2002) (quoting RCW 34.05.574(1))).

C. The Board erroneously applied the law or acted arbitrarily and capriciously by issuing a conclusion of law that effluent discharge from the Facility has a reasonable potential to cause

[12] *See* Koch Testimony (March 25, 2013), RP at 118:9-120:9; 124:23-125:5 (Ecology did what EPA Guidance document suggested, which is what EPA did in similar situation); Ex. ECY 6, AR 3751-55, 3753 (EPA Responses to Comments stating that "[t]he lack of data also prevents the EPA from determining whether the Idaho publicly owned treatment works (POTWs) have the reasonable potential to cause or contribute to excursions above any of the affected jurisdictions' water quality standards for PCBs").

or contribute to a violation of water quality standards for PCBs in the Spokane River.

Ecology properly exercised its discretion under controlling EPA guidance when it determined to issue Spokane County's Water Reclamation Facility a Permit without conducting a reasonable potential analysis, and to require the Facility to collect monitoring data with which to conduct a reasonable potential analysis for the next Permit cycle. Having improperly failed to give deference to that decision, and absent any findings to support a conclusion that Ecology had abused its discretion, the Board improperly second-guessed Ecology's decision. The Board then compounded that error by proceeding to make its *own* determination of the reasonable potential analysis, effectively usurping Ecology's discretionary authority again. In that regard, the Board improperly applied the law of agency review, and acted in an arbitrary and capricious manner.

1. The Board erred in proceeding to issue a conclusion of law contrary to Ecology's discretion when Ecology had properly exercised its discretion and determined not to conduct a reasonable potential analysis.

As discussed above, Ecology's decision not to conduct a reasonable potential analysis without facility specific monitoring data was

a matter within its discretion, and an application of its technical expertise in complex scientific issues regarding water quality. By proceeding to conduct its *own* reasonable potential analysis, contrary to Ecology's decision, the Board failed to afford Ecology's decision the deference to which it was entitled. Consequently, the Board's conclusion of law that the Facility effluent does have a reasonable potential to cause or contribute to a violation of water quality standards results from an erroneous application of the law, or arbitrary or capricious action.

The Court should note that the issue is not whether Ecology had information from which it might have conducted a reasonable potential analysis, or whether the administrative record includes evidence that might support the Board's determination. Instead, the issue is whether Ecology abused its discretion in determining not to conduct a reasonable potential analysis in the absence of facility specific monitoring data. As discussed above, it clearly did not, and the Board made no findings to support any conclusion that it did. The Board cannot simply "skip-over" the deference due to Ecology's initial decision by proceeding forward to the next question, lest the deference due to Ecology's expertise be rendered meaningless. Consequently, the Board's conclusion of law that there is a reasonable potential for discharge from the Facility to cause or contribute to a violation of water quality standards must also be reversed.

D. Because Ecology properly exercised its discretion in deciding not to conduct a reasonable potential analysis, there is no requirement that the Facility's Permit include water quality based effluent limits for PCBs.

Federal regulations only require a NPDES permit to include effluent limitations *if* it is determined that a discharge has the reasonable potential to cause or contribute to a violation of water quality standards. 40 C.F.R. § 122.44(d)(1)(iii). If it is *not* determined that a discharge has a reasonable potential, water quality based effluent limitations are not required.

E. Because there is no requirement that the Facility's Permit include effluent limits for PCBs, Condition S12 cannot be found insufficient as an effluent limit for PCBs.

Having improperly usurped Ecology's discretionary authority and determined that there *was* a reasonable potential to cause or contribute, the Board proceeded to evaluate Permit Condition S12 against the Board's view of what a water quality based effluent limit must contain. Board's Decision, COL 12-16. The Board concluded that Condition S12 is not adequate as a narrative water quality based effluent limit, and remanded the County's Permit to Ecology with directions to modify Condition S12.

The Board erred in evaluating Permit Condition S12 as a water quality limitation. Because Ecology had not determined that there *was* a reasonable potential to cause or contribute to a violation of water quality standards, Ecology was not required to include a water quality based effluent limitation for PCBs in the Spokane County Permit. Consequently, Ecology did not abuse its discretion or act arbitrarily or capriciously by drafting Condition S12 as it did, even assuming *arguendo* that Condition S12 is not adequate as a narrative based water quality effluent limitation.

F. Because Condition S12 cannot be found insufficient as an effluent limit for PCBs, there is no authority for the Board's Order directing Ecology to modify Condition S12.

WAC 371-08-540 provides:

> **Review of permits under the National Pollutant Discharge Elimination System.**
>
> (1) The provisions of this section shall apply only to review proceedings before the board pertaining to permits issued by the department under the provisions of the National Pollutant Discharge Elimination System.
>
> (2) In those cases where the board determines that the department issued a permit that is invalid in any respect, the board shall order the department to reissue the permit as directed by the board and consistent with all applicable statutes and guidelines of the state and federal governments.

Thus, the Board's authority to direct reissuance of an NPDES permit is limited to situations in which the permit is first properly

determined to be *invalid.* Then, the Board can only direct Ecology to reissue the permit to make it consistent with applicable statutes and guidelines of the state and federal governments.

In this case, the Board's conclusion that the permit is invalid is premised upon its conclusion that the permit was required to impose a water quality based effluent limit for PCBs. That conclusion was based, in turn, upon the Board's conclusions that Ecology should have conducted a reasonable potential analysis, and that the discharge did have a reasonable potential to cause or contribute to a violation of water quality standards. Those conclusions reflected an erroneous application of the law, or arbitrary or capricious action, because the Board failed to afford Ecology the deference to which it was due regarding a technical and scientifically complex exercise of Ecology's expertise and discretion in administering the state's water laws.

Ecology properly exercised its discretion in deciding not to conduct a reasonable potential analysis without facility specific monitoring data. Absent a reasonable potential determination, water quality based effluent limits were not required by law. Because such limits were not required, the Spokane County Permit cannot be found to be invalid for allegedly failing to include them. Absent invalidity, the Pollution Control Hearings Board lacks authority to order modification of

the Permit as Ecology issued it. The Board's Conclusions of Law 10-16, and its Order directing Ecology to modify Permit Condition S12 at Order paragraph 1(a)-(c), erroneously apply the law, or are arbitrary and capricious, and must be reversed.

V. CONCLUSION

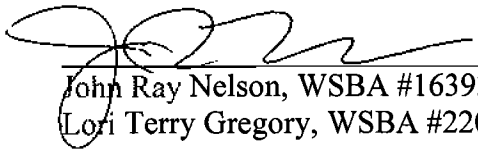
The Legislature designated Ecology to regulate the State's water resources. RCW 43.21A.020. Consequently, Ecology's interpretation of relevant statutes and regulations dealing with water resources are afforded great weight. In reviewing Ecology's NPDES permits, the Pollution Control Hearings Board should show deference to Ecology's expertise in administering water quality laws and in making technical judgments, especially those involving complex scientific issues. *Port of Seattle,* 151 Wn.2d at 593-94. Additionally, Ecology's exercise of discretion may only be reversed if it is manifestly unreasonable.

In this case the Board failed to afford Ecology the deference it was owed, and undertook to second-guess Ecology's discretionary decision. The Board did not make, and could not have made, any findings to support a conclusion that Ecology had abused its discretion. Under Ecology's proper exercise of discretion, the Spokane County NPDES Permit is entirely valid as written. The Board's order directing modification of the

Permit erroneously applies the law, or is arbitrary and capricious, and must be reversed.

RESPECTFULLY SUBMITTED THIS 28th day of May, 2015.

FOSTER PEPPER PLLC



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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner(s) indicated:

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FOSTER PEPPER LAW OFFICE

May 28, 2015 - 4:06 PM

Transmittal Letter

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Court of Appeals Case Number: 47158-2

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Brief of Appellant Spokane County

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